



HOUSE COMMITTEE ON LAND DEVELOPMENT (LRC) (2013)
March 27, 2014
Room 421 LOB

The House Committee on Land Development (LRC) (2013) met on, Thursday, March 27, 2014 at 1:00p.m. The meeting was held in Room 421 LOB. Members present were: Representative Larry Bell, Representative Mark Brody, Representative Edward Hanes, Jr., Representative Frank Iler, Representative Pat McElraft, Representative Chuck McGrady, Representative John Torbett, and Representative Andy Wells.

Representative John Torbett presided. The minutes from the two previous meetings were approved.

Representative Torbett: We are opening the meeting up for discussion of the final report.

Representative Bell: I think we should draft legislation to deal with what happened down there so that we won't have a recurrence of that situation.

Representative Brody: I am trying to look for; where in this process did this thing fall apart? We were in a transition and that if this situation happened again under the current rules, it would be pretty rare. There was a series of events that said to me, I think I found where the problem lies and basically it's that the code required it to be inspected. The Gaston County building inspector walked up to the site, saw the guy doing the work and never questioned. It leads me to the conclusion is that Gaston County inspection didn't do what they were supposed to do.

Representative Torbett: Gaston County could now stop issuance of a certificate of occupancy, until that is remedied.

Bill Patterson, Staff Attorney: Gaston County received permission from the Sedimentation Control Commission, sometime after this Magnolia Place was started, for approval of its own soil erosion control and sedimentation control plan, and when that permission was granted, then Gaston County took over the role that had been played by DENR. 1. The coordination that could be had between the water quality part of the county that enforced the new ordinance and the building inspection department, which was responsible for the code, was greater than what existed before. 2. Under the new ordinance, there is a particular provision that says, if the erosion control ordinances are not met, the building inspection folks can withhold the issuance of a certificate of occupancy.



Representative Torbett: That could be a recommendation, as far as improving the communication between multiple agencies.

Representative McGrady: My impression from watching this is that this is a bad situation that occurred, but it is not likely to occur again, at least in this place, because Gaston County has now taken on soil and sedimentation and presumably, is that the two pieces will come together. There were initially problems within the development community with that, but my sense now is that everybody is very active, because we are getting quicker responses. There are things in the world that go wrong that Raleigh can't fix. I don't think us trying to impose some Raleigh based solution for 100 different counties; I would prefer us not go there.

Representative Torbett: We haven't touched one of the primary things we are addressing is that under normal bankruptcy situations.

Representative McGrady: You hit upon what my biggest concern is back in Henderson County, that at the same time this situation was going on, we had a major subdivision just blow out. Luckily we had some bonds in place.

Representative Torbett: If you have a common element that crosses multiple properties, but is not an amenity, should that be added as a bondable piece for that development.

Representative Wells: I will agree with Chairman Brody, although it wasn't 100%, most of what we have heard in this process, points squarely at the Gaston County folks. I think it is fair to say that the inspection department could have held this long enough to ask the question and there was some indication that they even did that. Whether, and he really danced on this at the meeting, but his counterpart, the head of the safety inspection association, said he would have held it. If you see something to that extent, what we saw on the grounds there, somebody needs to ask some questions. Maybe the questions will all come back that it is not your problem. If they had done that, we wouldn't have had to go hear about it again, because they would have had some say in it wasn't their problem and we would have known what the problem was. Not only did they not take responsibility for fixing it, they didn't even take responsibility for finding out who was responsible. Every time we go telling local government what to do we hear a good bit of flack. This is not the only problem we've got. Rather than telling them how to fix their problem, maybe we say to the local government that if you sign on, on a certificate of occupancy, or a subdivision, you are financially responsible. If you don't have somebody on the hook, you are on the hook. That would take care of situations like this, which would at least cause them to stop and ask questions. We've got a related issue that has nothing to do with bankruptcy. We had a 1000 year storm event in Catawba County on July 27; we blew out bridges, culverts, and everything else. Where that was in a DOT or city maintained subdivision that was not a problem. We have subdivisions that the county has approved and there is no mechanism in place for maintenance of those streets and the culverts and there is a major bridge blown out in a subdivision and everybody is saying it is not our problem. The county wants DOT to take it over, obviously, DOT doesn't have the money to take it over, but the county in this case created the problem. The developer was gone 30 years ago. We've got to get some



mechanism in place. That's one of the bigger debates that is before us. Who's going to take over all of these unmaintained streets and subdivisions that were created during the good times in the 80's and they are now getting to the point in their life where they are starting to fall apart.

Representative Torbett: Let's say that the person was building the retaining wall correctly and the county did approve the work in progress, not complete. Before the wall was completed, the company went bankrupt. So you still have the same cause and effect in place, now, although the wall was being built. Is there some kind of fallback, which why I was initially thinking of adding it to the bonding requirement, to cover the completion of that.

Representative Wells: If you can get the mechanism in place for long term maintenance. There is a homeowner's association responsible for a building that collapses. At some point a maintenance mechanism needs to be in place to take care of property, whether it is a retaining wall or building foundation, before you start allowing a certificate of occupancy and allow the developer to sell it. If you keep the money flow cut off, they will address the problem. Whether it is county, city, homeowner's association, before a project is finally approved, we all need to know who is going to maintain it when a problem comes up.

Bill Patterson, Staff Attorney: In the context of planned communities, at a certain point in time the common areas belong to the HOA and then they are responsible for maintaining those properties and assessing the member's dues to accomplish that. There is not a statutory requirement; there is a duty on the board of directors under the non-profit corporation act to properly manage the affairs of the association. That would include providing for future maintenance.

Representative Wells: At some point before you get final approval that allows a certificate of occupancy, you've got control of the building. The HOA surely had to have control that building. You at least make them dedicate the part of the property that adjoins that building and is needed to access it. What if you allowed people to move in and they hadn't dedicated the entrance road to the HOA. I could buy that land and just cut them off. I think the counties will figure this out if we tell them, if you don't get this done properly, you own it. When counties go out and let people to crappy development, they can undercut the price of a good developer by 10 to 20%. Which means they are going to get all the savings. We're going to be having meetings like this about it later, and the good developer has been put out of business because he couldn't compete. We are creating a situation. We are allowing an unlevel playing field that is going to drive out good people.

Representative McElraft: I remember before I became a town commissioner in Emerald Isle that we had a building inspector that was sued, the town of Emerald Isle was sued, because he went out and inspected that dryfit stuff on a house that was the synthetic stucco and because he didn't inspect something, something was done wrong, that house rotted out and they had to tear the whole house down, and it was hundreds of thousands of dollars. The town of Emerald Isle ended up, I believe, responsible for that.



Bill Patterson, Staff Attorney: I do know when it comes to tort liability or liability negligence on the part of local inspection officials; it depends a lot on whether or not the municipality or county involved has waived sovereign immunity by the purchase of insurance. It's not going to be the same across the state.

Representative McElraft: So, in sovereign immunity, then the counties don't assume any responsibility. As far as in this case, would Gaston County not have any responsibility, if they were immune?

Bill Patterson, Staff Attorney: I would not be able to answer that question. That is a question that is very fact specific.

Representative Iler: We have many of these subdivisions in my area where the developer came in, the recession hit, and boom they were gone. This case is an endangerment to these people. There is a 14 foot earth hill hanging over their house and, we saw the mud slide, something like that would be enough to damage a house and I believe the county would have liability.

Bill Patterson, Staff Attorney: Assuming that the facts were such that the county would be held to have waived its sovereign immunity and could therefore is liable for negligence on the part of one of its inspectors. The people who would bring that claim would have to meet requirements to succeed. An attorney to represent to approve negligence, but the city or county could offer the defense of contributory negligence.

Representative Iler: The property line was bulldozed up to DOT property and is the remaining hill just standing there on DOT property. Would that be a DOT responsibility in any way?

Bill Patterson, Staff Attorney: It is my understanding that the fence is on the edge of each lot's property line. Behind the fence, a few feet back is this bank. The common area is owned by this defunct company, is about 25 feet in width. My guess is that fence is at that 25 foot line. So the question would be, how close to that fence would it be possible if they wanted to try and remedy it by making that slope workable.

Representative Torbett: Note that we are not trying to remedy this one specific project, out scope is broader in scale. We have seen the negative impact that an action had to North Carolina property owners and it is our task to recommend, suggest, or decide to take no action, is there a remedy that can preclude that from happening again.

Representative Brody: I come down to the question, can we make a statement of finding. We find that this was wrong and what the solutions are. I believe to fix this particular problem, it is going to be a private fix, of grading and what can be done and buying the remaining lots and building homes. DENR stated they would work with a private company to fix the issue and not have to pay all the fines. When you are a developer and you have all kinds of things going on you kind of picture it as an orchestra with these guys playing over here, here, and here. What we don't have is the maestro. Who's directing this and making sure this is going to coordinate to the



very end. The only one that can be held to that standard is the entity that gives the ok to do it, which in this case was Gaston County or Lowell. We say to them if you don't bond you are going to be held liable.

Representative McElraft: Is there not a requirement for bonding when you have a development?

Bill Patterson, Staff Attorney: For difference aspects of the project there are local requirements.

Lisa Martin, Director of Government Affairs, North Carolina Homebuilders: On the question of bonding, for roads they may require bonds. The uniqueness and tragedy of this Magnolia Place project. The reason that these are so few and far between is because there are a number of local governments that have local sediment erosion control programs. The North Carolina Homebuilders as a long history of supporting sediment control. We know how important it is. We have supported fee increases for the state program. Our projects get inspected quickly, but the flip side is that our members realize that if there is a problem, then it can be corrected quicker, because the fines go back to the day that it started. The other problem is that the fines do not go to fixing the project; it goes to the school system. Prior to the last meeting, I sent some information on retaining walls. Dating back to 2005, the AG sent a written opinion that said structures that are outside of the building code, should be inspected by local inspection departments. In 2006 and 2009, the building code was amended and refined to keep the requirement in that not only did retaining walls have to be inspected by the local inspections department, they had to be designed in accordance of engineering standards, which means they will be signed and sealed. We are not taking sides on any of this.

Representative McGrady: I agree with the position she just stated. I feel badly about the situation, but I think counties have already begun to deal with that situation. I don't like the idea that Raleigh will impose some set of restrictions on everybody.

Representative Wells: I can probably tell you as many abuses from bonding as I can for the good. It's a tempting target for local governments and it's beyond the temptation of some of them. We've involved into the develop world. If I have 100 acres that is creating a problem for the people of North Carolina, everybody know exactly who to come to to fix it. I can run up 1 hundred million dollar tab in just Catawba County fixing roads. At the end of the day the county who approved it needs to assume the liability.

Representative Torbett: The committee's direction would be to have the enforcing agents be the responsible party for ensuring the best good for the public, in the case of common elements.

Bill Patterson, Staff Attorney: If the area of concern is erosion control, that whoever the agency is that is responsible for issuing a certificate of occupancy for residential dwelling in a planned community. If that certificate of occupancy is issued before the completion of any required erosion control structures on the common elements, the permitting authority is responsible for completing them if the other entity does not get the job done. If the local permitting authority has authority to do this, if not you have to have it, they could choose, in a given case, if they are



going to issue their certificate of occupancy before the completion, they could say we'll issue it on the condition that the developer puts up a bond sufficient to make it gets finished.

Representative Brody: If you are the one that is going to approve it, you are responsible, and let the state take a hands -off position on how you go about protecting yourself.

Representative McElraft: Maybe we can say that local government cannot have this sovereign immunity when it comes to that they have a bond there to take care of it.

Rep. Torbett: I'm hearing that the will of the committee is that we ask staff to draft some recommendations that would illustrate the issue and the finding and determination being responsibility resting with the governing entity that issues the authorization.

Bill Patterson, Staff Attorney: We will get it finalized and sent out to everyone. That would be something that whatever bill is introduced during short session, assuming the LRC approves our report.

Representative McElraft: Are we then, going to discourage local governments from doing these inspections and taking them away from the state, like the sedimentation control and does that put a bigger burden on the developer to have to wait for the state, does that put a bigger burden on the state. I do like the local governments doing the sedimentation control. I think it's better for the local governments, I think it's better for the people, I think it is better, instead of waiting for the state to come there, the state has enough issues of our own.

Representative Torbett: I believe that the language would address specifically, common elements, I don't know how that would negatively impact county governments that are to date currently doing the soil erosion.

Representative McElraft: Are we, because of this one circumstance and probably a few others, going to impact the whole development community and everybody that does the honorable thing?

Representative Torbett: I have no intent of punishing all for the sins of a few. It is our fiduciary responsibility as well as the responsibility for the well beings of our friends and neighbors that we look after things that negatively impact them, to the point that they have little to no recourse.

Representative Iler: I have a real concern about the number of zombie developments in my area. The county has to go back to a bonding company. I don't want to make my county have to go back and take care of 30 year old subdivisions that were not maintained.

Bill Patterson, Staff Attorney: It is the committee's desire then that we come up with a recommendation that would address the responsibility for completing those parts of any development related common areas that relate to sedimentation or erosion control. That the certificate of occupancy could not be issued for any individual residential unit unless there was



already established an owner, other than the developer, that the title of the common area would have already had to be transferred to the HOA? The declaration for this community provided that before the sale of the first lot or unit, the developer was to convey title to common areas to the HOA, but that was not done. So you don't issue a certificate of occupancy for the first unit unless the common element has been conveyed to the association. So that whatever the declaration said in that particular case here, would be enforced by law.

Representative Torbett: If we just have a string of responsibility that rests at the governing entity that provides the approved documentation to move to the next level?

Representative McElraft: If you are going to make the town of Emerald Isle responsible and you've got a certified engineer that has done the plan, he has certified to the town that he is responsible, so now in statute, we are saying that the town government is responsible. Does that take away any legal responsibility from that engineer?

Bill Patterson, Staff Attorney: Another option that the local permitting authority has, is don't issue the certificate of occupancy if that hasn't been completed. You don't have to issue the certificate of occupancy if you don't want to assume that risk.

Lisa Martin, Director of Government Affairs, North Carolina Homebuilders: I think there is some confusion; this might have been clarified at the on-site meeting, the sedimentation erosion control that was initially approved when the development started in 1999. The sediment inspector from the state said, they never had and never do have responsibility for retaining walls. So according to the information I have, Gaston County Code Inspection Department approved the retaining wall plans on March 2, 2010. So this retaining wall was approved, after it was required that it be engineered and by requiring in the building and inspection department said. I just wanted to make sure you know there is a difference, retaining walls are not the responsibility of the sediment erosion control, not even at the local level they are, I believe that they always fall under the building inspection department, because they are part of the building code, kind of a separate thing, but they are actually part of the building code. Gaston County did approve the retaining wall, when they would have had it engineered and sealed and re-inspect. I just want to make sure that there wasn't a pre dating on either that it started 2005 with the attorney general, the actual retaining wall for this property or where it is pertinent, was after, that would have been in the building code.

Representative Brody: Being in the construction industry for a long time, there is a term bureaucratic brick wall. We try to explain what this agency does and what that agency does; you get to the place where you bang your head against the brick wall. Ultimately they come back with "that's what the legislature says", so we've got to sort this out. I'm trying to attempt to not allow them to do that in the future.

Representative Iler: Is there no safety inspection before the certificate of occupancy is issued? Why would that not have been caught?



Representative Torbett: When they are doing the code inspection for the certificate of occupancy or their final walk through, which they are only obliged to make sure within a foot of the structure, and anything outside of that is beyond their certificate of occupancy. But now we understand that the soil erosion department of Gaston County can work cohesively with them and they can actually hold up a certificate of occupancy.

Bill Patterson, Staff Attorney: Some developments are hundreds of units and in some cases it could be years before the final phase is developed. Is there a one size that could possibly fit all in the context of this issue, when in a large development, you are saying you wouldn't issue the very first certificate of occupancy for the first residence, until some common area was either completed the construction of the sedimentation control or it had been transferred to the HOA. I don't know how practical that would be. We could possibly limit the effect of this to allowing the building inspector or requiring the building inspection department to take into account in deciding whether to issue a certificate of occupancy, not just what is happening on that lot, but if there is a condition on the common area, which would pose a danger to somebody who moves in, then that could be a basis for withholding the certificate of occupancy.

Representative McElraft: I think if the county had done the right thing in the beginning or the state had done the right thing to follow up and make sure this was a retaining wall that was being engineered and not just a fence, and then this would not have happened. Somebody dropped the ball in government.

Representative McElraft: I truly think that we need to do nothing. Would it not be more appropriate for DENR to say to counties, you have taken over the responsibility of erosion control? You are now responsible to make sure that retaining walls are built, to take care of this.

There being no further business, the meeting adjourned at 3:10 p.m.

Representative John Torbett
Presiding

Viddia Torbett, Committee Clerk